

Message Text

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PAGE 01 STATE 018817

ORIGIN EB-08

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DRAFTED BY TREASURY:RBAHQ:EB/IFD/OIA:TBRODERICK

APPROVED BY EB/IFD/OIA:RJSMITH

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L/EB:SBOND (INFO)

AF/EP:WHITE (SUBS)

AID/AF/GC:EDRAGON (INFO)

L/AF:MMATHESON (DRAFT)

COMMERCE:JSEVER (INFO)

AID/AFR/ESA:TO'KEEFE (SUBS)

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FM SECSTATE WASHDC

TO AMEMBASSY DAR ES SALAAM PRIORITY

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E.O. 11652: N/A

TAGS: EINV, TZ

SUBJECT: VON ZASTROW CLAIM

REFS: (A) DAR 169, (B) DAR 4319 (NOV. 24, 1976),

(C) STATE 267871 (OCT. 30, 1976), (D) STATE 128641 (MAY 25,

1976), (E) STATE 200489 (AUG. 22, 1975)

1. AT THE DECEMBER MEETING OF THE INTERAGENCY EXPROPRIATION GROUP, THE GROUP REVIEWED THE RESULTS OF DISCUSSIONS HELD EARLIER THAT MONTH IN WASHINGTON BETWEEN AMBASSADOR SPAIN AND USG AGENCY REPS ON THE SUBJECT CLAIM, AND
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PAGE 02 STATE 018817

AGREED THAT BEFORE APPROACHING THE PARTIES TO ENCOURAGE RENEWED MOMENTUM TOWARD SETTLEMENT, IT WOULD BE HELPFUL TO ELICIT FURTHER EMBASSY VIEWS ON HOW BEST TO DO SO.

2. INITIALLY, WE WOULD APPRECIATE BEING INFORMED WHEN WITHERS-PAYNE OBTAINS LEGAL AUTHORITY TO PURSUE THIS CASE (WE PRESUME HE WILL BE RETAINED ON BEHALF OF THE SUCCESSOR

TO THE CLAIM).

3. WE WOULD ALSO APPRECIATE EMBASSY'S JUDGMENT ON WHAT STEPS THE USG SHOULD CONSIDER TAKING AT THIS POINT TO ENCOURAGE A PROMPT AND MUTUALLY-SATISFACTORY RESOLUTION OF THE CASE. SEVERAL POSSIBLE ALTERNATIVES ARE DISCUSSED

BELOW, AND EMBASSY COMMENTS ON THESE (AND OTHER) APPROACHES WOULD BE APPRECIATED.

A. LIMITED EMBASSY "GOOD OFFICES" ROLE: BASED ON THE CURRENT SITUATION AND ON EMBASSY ASSESSMENT PARA. 1(C) REF B, IT IS DIFFICULT TO BE SANGUINE ABOUT THE PROSPECTS OF SUCCESS FROM SUCH AN APPROACH. IF EMBASSY BELIEVES, HOWEVER, THAT CIRCUMSTANCES WARRANT A RENEWED ATTEMPT TO IMPRESS UPON THE TANGOV THE URGENT NEED TO ELIMINATE THIS POTENTIALLY SERIOUS PROBLEM IN OUR BILATERAL RELATIONS, SOME ROOM MIGHT REMAIN FOR AN EFFORT ALONG THESE LINES.

B. ENCOURAGE AGREEMENT ON AN INDEPENDENT METHOD OF RESOLVING OUTSTANDING ISSUES: FOR EXAMPLE, RETENTION BY THE PARTIES OF A CONSULTANT TO VALUE THE CLAIM, OR SUBMISSION OF DISPUTED ISSUES OF COMPENSATION TO A FACT-FINDING OR ARBITRAL MECHANISM. FYI. ALTHOUGH TANZANIA DOES NOT APPEAR TO BE A MEMBER OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, AD HOC ARRANGEMENTS SUCH AS THIS COULD BE DEvised BY MUTUAL AGREEMENT. END FYI. ONCE THE PARTIES REACHED AGREEMENT ON A PROCESS OF THIS SORT, TANZANIA WOULD HAVE TAKEN A LIMITED OFFICIAL USE

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PAGE 03 STATE 018817

CONSIDERABLE STEP TOWARD ASSUAGING OUR CONCERN ABOUT THE REQUIREMENTS OF U.S. LEGISLATION. ON THE OTHER HAND, SUCH ARRANGEMENTS CAN BE SIGNIFICANTLY MORE FORMAL, TIME-CONSUMING, AND EXPENSIVE THAN A PROMPT NEGOTIATED SETTLEMENT, AND MAY THEREFORE BE UNATTRACTIVE TO A CLAIMANT OF APPARENTLY LIMITED MEANS.

C. ACTIVE USG MEDIATION: THIS COULD BE UNDERTAKEN BY THE EMBASSY OR BY A WASHINGTON-BASED USG TEAM, AND WOULD INVOLVE DETAILED DISCUSSIONS WITH THE PARTIES TO ENCOURAGE NEGOTIATING FLEXIBILITY AND MOVEMENT TOWARD A FAIR COMMON GROUND. AT SOME POINT, WE MIGHT CONSIDER OBTAINING AN INDEPENDENT VALUATION OF THE CLAIM TO PROVIDE A FRAME-OF-REFERENCE FOR SUCH DISCUSSIONS. AS WITH 3 (B), TANGOV WILLINGNESS TO PARTICIPATE IN SUCH A PROCESS WOULD GO A LONG WAY TOWARD MEETING OUR CONCERNS ABOUT APPLICABLE U.S. LAW, AND THIS COULD ALSO SERVE AS A VALUABLE CATALYST IN BREAKING THE APPARENT IMPASSE BETWEEN THE PARTIES. IT ASSUMES, HOWEVER, A WILLINGNESS TO COMMIT

A SUBSTANTIAL AMOUNT OF USG TIME, EFFORT, AND EXPERTISE
IN SEEKING TO DO SO.

4. IN CONSIDERING THE DESIRABILITY OF A USG MEDIATION
EFFORT, IT MAY NOT BE NECESSARY AT THE OUTSET TO CITE
PARTICULAR FIGURES OR RANGES, BUT WE SHOULD HAVE VALID
REASONS IN MIND TO JUSTIFY ASKING THE PARTIES TO CONSIDER

CHANGES IN THEIR RESPECTIVE POSITIONS. WE SHOULD ALSO
ANTICIPATE APPROACHING THEM AT ROUGHLY THE SAME TIME AND
IN THE SAME MANNER TO AVOID CREATING THE IMPRESSION
THAT WE ARE UNDULY PRESSURING EITHER SIDE FOR THE BENEFIT
OF THE OTHER. THE FOLLOWING TWO PARAGRAPHS ILLUSTRATE
THE KINDS OF QUESTIONS WE MIGHT INITIALLY CONSIDER PUTTING
TO THE PARTIES TO BEGIN ATTEMPTING TO BRIDGE THE GAP
BETWEEN THEM. WE WOULD APPRECIATE YOUR COMMENTS ON
THESE AND OTHER INQUIRIES WHICH YOU BELIEVE MAY BE
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PAGE 04 STATE 018817

APPROPRIATE.

5. FOR WITHERS-PAYNE.

A. IN CALCULATING HIS "UNEXHAUSTED IMPROVEMENTS," VON
ZASTROW APPARENTLY USED BOTH HISTORICAL COST AND MARKET
PRICE IN ASSIGNING VALUES TO VARIOUS CATEGORIES OF
ASSETS. WHICH ASSETS WERE VALUED AT COST, AND WAS
DEPRECIATION TAKEN INTO ACCOUNT IN DOING SO? WHICH WERE
VALUED AT CURRENT MARKET, FOR WHAT REASON, AND HOW WERE
THESE AMOUNTS DETERMINED? WOULD THE AMOUNT OF THE CLAIM
BE SIGNIFICANTLY DIFFERENT (AND HOW SO) WERE IT COMPUTED
ENTIRELY ON A DEPRECIATED COST BASIS?

B. THE TANGOV CLAIMS TO HAVE USED A "PROFITABILITY"
STANDARD IN FORMULATING ITS OFFER. IF FAIRLY APPLIED,
WOULD THIS BE AN APPROPRIATE METHOD FOR VALUING THE CLAIM?
IF NOT, WHAT APPROACH IS PREFERABLE, AND WHY? WHAT IS
YOUR ESTIMATE OF THE VALUE OF THE CLAIM ON A PROFITABILITY
OR GOING-CONCERN BASIS? HOW DOES YOUR ANALYSIS OF THE

PROFITABILITY OF THE COFFEE ESTATE DIFFER FROM THE
TANGOV'S (I.E., ASIDE FROM ITS APPARENT EXCLUSION OF
COMPENSATION FOR THE SAFARI BUSINESS)? WERE THERE ANY
SALES OF COMPARABLE PROPERTIES IN TANZANIA PRIOR TO THE
NATIONALIZATIONS WHICH MIGHT HELP ESTABLISH THE MARKET
VALUE OF THE VON ZASTROW PROPERTIES?

C. WE UNDERSTAND THAT VON ZASTROW TYPICALLY HAD CONSOLI-
DATED FINANCIAL STATEMENTS PREPARED TO REFLECT THE
COMBINED FINANCIAL POSITION AND OPERATING RESULTS OF

THE SAFARI BUSINESS AND THE COFFEE ESTATE. COULD WE BE PROVIDED WITH COPIES OF THESE, TO INCLUDE BOTH BALANCE SHEETS AND INCOME STATEMENTS? HOW DOES THE AMOUNT OF THE CLAIM DIFFER FROM THOSE OF OTHER CLAIMANTS WITH SIMILAR PROPERTIES, AND WHAT ACCOUNTS FOR THE DIFFERENCE?
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PAGE 05 STATE 018817

6. FOR THE TANGOV.

A. AS WE UNDERSTAND IT, THE ORIGINAL STANDARD FOR COMPENSATION, VIZ., "UNEXHAUSTED IMPROVEMENTS," WAS ABANDONED BECAUSE IT RESULTED IN VALUATIONS CONSIDERED BY THE TANGOV TO BE TOO HIGH. IN WHAT OTHER RESPECT IS "PROFITABILITY" A MORE APPROPRIATE STANDARD FOR VALUING THE CLAIMS THAN THE ORIGINAL CRITERION OR SOME VARIANT OF IT?

B. IN EVALUATING PROFITABILITY, THE USE OF A HISTORICAL PERIOD IS REASONABLE, BUT WITH A PRODUCT SUBJECT TO CYCLICAL PRICE MOVEMENTS, THE PERIOD CHOSEN SHOULD REFLECT BOTH HIGH AND LOW PRICE LEVELS. DOES THE PERIOD IN FACT CHOSEN DO SO?

C. THE CAPITALIZATION FACTOR OF 3.5 MAY BE LOW. FROM OUR INFORMATION IT APPEARS THAT THE TANGOV USED A LOW CAPITALIZATION FACTOR BECAUSE PROFITS WERE LOW; IF SO, THE METHODOLOGY WOULD BE LOGICALLY INCORRECT, SINCE DURING PERIODS OF LOW COFFEE PRICES ONE WOULD EXPECT THE RATIO OF EQUITY CAPITAL TO INCOME TO BE HIGH. THE U.S. FOREIGN CLAIMS SETTLEMENT COMMISSION HAS AWARDED CLAIMS WITH CAPITALIZATION FACTORS RANGING FROM TEN TO SIXTEEN AND TWO-THIRDS, AND A SIMILAR FACTOR WOULD SEEM REASONABLE IN THIS CASE UNLESS THE TANGOV CAN DEMONSTRATE THAT HIGHER PROFIT LEVELS WERE TYPICAL OF THE COFFEE BUSINESS THROUGHOUT THE RELEVANT PERIOD.

D. THE EXCLUSION OF COMPENSATION FOR THE SAFARI BUSINESS DOES NOT SEEM WARRANTED. THE COFFEE ESTATE AND THE SAFARI BUSINESS WERE APPARENTLY INCORPORATED AS A SINGLE ENTITY, AND CONSOLIDATED FINANCIAL STATEMENTS WERE PREPARED TO REFLECT THE COMBINED RESULTS OF THEIR OPERATIONS. THEY ALSO APPEAR IN MANY RESPECTS TO HAVE BEEN COMPLETE-
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PAGE 06 STATE 018817

MENTARY ENTERPRISES, AND THE NATIONALIZATION OF THE

ESTATE PROXIMATELY RESULTED IN THE LOSS OF INCOME FROM THE SAFARI BUSINESS. THE FACT THAT THE LICENSE MAY HAVE BEEN TERMINABLE SHOULD CERTAINLY BE TAKEN INTO ACCOUNT IN VALUING THE EXPECTATION OF FUTURE PROFITS FROM THE SAFARI BUSINESS, BUT SINCE IT HAD APPARENTLY NOT BEEN TERMINATED PRIOR TO THE TAKING, IT SEEMS REASONABLE TO INCLUDE SUCH AN EXPECTATION AS AN ELEMENT OF COMPENSATION ARISING FROM THE NATIONALIZATION.

E. THE REDUCTION OF ANNUAL INCOME BY EIGHTY PERCENT FOR ASSUMED SALARY AND EXPENSES MAY BE ARBITRARY. DOES THE TANGOV HAVE REASON TO BELIEVE THAT THE EXPENSES OFF-SET BY VON ZASTROW AGAINST ANNUAL REVENUES WERE IN FACT THIS HIGH?

7. WE MUCH APPRECIATE EMBASSY'S CONTINUING EFFORTS IN THIS CASE, AND LOOK FORWARD TO YOUR COMMENTS ON THE FOREGOING. THE NEXT MEETING OF THE INTERAGENCY EXPROPRIATION GROUP IS EXPECTED TO BE HELD WITHIN THE NEXT FEW WEEKS (POSSIBLY THE WEEK OF FEBRUARY 7), AND IT WOULD BE HELPFUL TO HAVE THESE IN HAND BY THAT TIME.
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